No. 15292

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NORTH AMERICAN AVIATION, INC., a corporation,

Appellant,

vs.

WANDA LEE HUGHES and RANDALL L. HUGHES, a minor, by his Guardian *ad Litem,* HARRY SUTTON,

Appellees.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable Justices of the United States Court of Appeals:

Appellant presents herewith its petition for rehearing upon the grounds hereinafter set forth.

A rehearing is vital and essential in this case which is critical to the entire aircraft industry. This Court in a unique and almost unprecedented decision, made without the citation of a single authority, has laid down a precedent which may well open the flood gates of litigation against the manufacturer of all aircraft without the necessity of proof of any substantial evidence of negligence in manufacture and under circumstances imposing a virtual insurer's liability against the manufacturer.

This case represents a radical departure from fundamental and basic principles of law. The opinion as well as the judgment is predicated solely upon speculation and conjecture.

Vague possibilities are magnified out of all proportion to their actual significance. The decision will serve only to confuse the aircraft industry. It is impossible to ascertain the nature or character of the alleged defect which the appellant manufacturer is charged with in the manufacture of this airplane. It is impossible to ascertain what negligent act or omission on the part of North American was responsible for the crash of the jet aircraft.

Petitioner respectfully requests that this Court grant a rehearing to the end that appellant may have an opportunity to demonstrate to this Court the error involved in this decision.

Grounds for Rehearing.

1. This Court has erroneously assumed that the question presented by this appeal is "Man or Machine," when the sole and basic issue is whether or not the appellant as manufacturer of an aircraft, was guilty of any negligent act or omission which was *the sole proximate cause* of the crash of the plane and the death of the decedent.

2. The Court's decision is contrary to previously decided cases in California and other jurisdictions relating to the liability of a manufacturer.

3. The Court erroneously stated that there was "substantial evidence" to support appellees' theory that the crash was due to a mechanical defect which developed while the plane was still in the air, that is, a defect in the manufacture of the plane, without indicating what evidence this Court believed supported such a theory.

4. The Court has actually applied erroneously the doctrine of *res ipsa loquitur* to this case in an effort to support the judgment, although the doctrine is not mentioned, and its application cannot be justified under the California cases.

5. The Court has failed to cite any authority for its opinion and has refused to pass upon the applicability of the doctrine of *res ipsa loquitur* which was discussed by both parties to this appeal.

ARGUMENT.

I.

This Court Has Erroneously Assumed That the Question Presented by This Appeal Is "Man or Machine," When the Sole and Basic Issue Is Whether or Not the Appellant as Manufacturer of an Aircraft, Was Guilty of Any Negligent Act or Omission Which Was the Sole Proximate Cause of the Crash of the Plane and the Death of the Decedent.

The very first sentence of the opinion indicates the reaction of this Court to this case in three words, "Man or Machine." This concept of the lawsuit, it is respectfully submitted, has derailed the judicial thinking, and as a result, the Court has not truly delineated the basic issue in the lawsuit, which is simple. The sole and only issue which is really involved, is whether or not the appellant, North American, was guilty of some negligent act or omission in the manufacture of the aircraft in question which proximately caused the crash and ensuing death of the pilot.

The Court's disjunctive suggestion of "Man or Machine" is inaccurate as applied to this case, since the accident may well have been unavoidable, in which event neither man nor machine would be responsible, and in any event appellant would not be responsible. Likewise if the failure of the plane was due to a latent defect in the jet motor furnished by General Electric no liability would attach to North American. Appellant is only responsible if during the process of the manufacture of the aircraft in question, it was guilty of some negligent act or omission which proximately caused the crash of the plane. No matter how much the evidence is tortured, there is an utter lack of evidence, let alone substantial

evidence, to indicate that the appellant was guilty of any negligence in connection with the manufacture or construction of the aircraft.

Although the Court has set forth the contentions of both sides, it cannot be determined from reading the last paragraph of the opinion, to what extent this Court believed that there was evidence of negligence in manufacture as claimed by appellees.

This Court has overlooked the basic and fundamental proposition that no judgment can be sustained if the essential facts require conjecture and speculation.

Reese v. Smith, 9 Cal. 2d 324, 328;

Wilbur v. Emergency Hosp. Assn., 27 Cal. App. 751;

Puckhaber v. So. Pac. Co., 132 Cal. 363;

Chesapeake and Ohio Ry. Co. v. Thomas, 198 F. 2d 783, 788.

At page 7 of the opinion, the very character of the speculation which appellees and this court engage in is demonstrated on the face of the opinion, where it is suggested that a possible and *perhaps likely* source of the "trouble" as the plane took off in an attitude of climb which is suggested as "not being very fast," was the possibility of a broken or leaking fuel line. Having speculated to this extent, the Court then apparently concludes in acordance with appellees' speculation that the pilot *may* have had trouble with the flight control system, and sought to switch to the emergency system, but before this could be accomplished the leaking fuel *may* have been ignited by a spark from the defective wiring or otherwise. (Opinion, p. 7.) Actually there is not one scintilla of evidence in the record that there was in fact any

defective wiring. The plane was flown through two test flights without the slightest problem in regard to the wiring of the aircraft. The Court then speculates that "undoubtedly the pilot then lost control, *probably* because of an explosion in the cockpit." This Court then reaches the conclusion that the crash was due to a mechanical defect which developed while the machine was in the air—a defect for which the appellant was responsible. The entire structure of the opinion is predicated upon one bit of speculation added to another to form a mass of conjecture, by which it is sought to be said that "substantial evidence" exists in support of the judgment.

II.

The Court's Decision Is Contrary to Previously Decided Cases in California and Other Jurisdictions Relating to the Liability of a Manufacturer.

The trial court accurately instructed the jury on the duty of a manufacturer. It is well settled that the mere fact that there is some type of a defect in the product does not establish liability if the manufacturer has exercised ordinary care in connection with the manufacture and preparation of the product. (See Appendix C, Op. Br. p. 8.)

The duty of the manufacturer is very simply stated in the case of *Maryland Casualty Co. v. Ind. Metal Products Co.*, 203 F. 2d 838 at 842, where the Court states:

> "It may be stated as a general rule that a manufacturer is required to exercise reasonable care in manufacturing an article which if carelessly manufactured, is likely to cause more than trivial harm to those who use it in the manner for which it is manufactured. Restatement of Torts Sec. 395. However, the defendant is only required to exercise rea-

sonable care, and the burden is on the plaintiff to show that the defendant has failed to exercise such care in one or more of the particulars in which reasonable care is required for the protection of those whose safety depends upon the character of the chattel."

The rule was likewise stated by the trial court accurately in the instruction heretofore referred to, B. A. J. I. No. 218:

"Duty of Manufacturer. The manufacturer of a product that is either inherently dangerous or reasonably certain to be dangerous if negligently made, owes a duty to the public generally and to each member thereof who will become a purchaser or user of the product. That duty is to give an appropriate warning by label or otherwise of any known dangers which the user of the product ordinarily would not discover and to exercise ordinary care to the end that the product may be safely used for the purpose for which it was intended and for any purpose for which its use is expressly or impliedly invited by the manufacturer. Failure to fulfill any such duty is negligence.

"When in the manufacture of such a product use is made of any material or part obtained from a source outside the manufacturing plant in question, it is the duty of the manufacturer to make such inspections and tests of that imported material or part as ordinary prudence would indicate to be necessary, to the end that the safety of the finished product for the intended or invited use will be reasonably certain. Failure to fulfill that duty is negligence.

"On the other hand, if the manufacturer performs that duty, and the inspections and tests do not indicate a defective or dangerous condition, and it does

not know of such a condition, it is not liable for injury resulting from its use of such material or part, although it proves to be defective." (Appendix C, p. 8.)

This rule is predicated upon the many cases which have followed the famous case of *McPherson v. Buick Motor Co.,* 217 N. Y. 383, 11 N. E. 1050, and is to be found in California in such cases as *Sheward v. Virtue,* 20 Cal. 2d 410; *Stultz v. Benson Lumber Co.,* 6 Cal. 2d 688, and *Judson Pacific-Murphy, Inc. v. The Stove Co.,* 127 Cal. App. 2d 828.

The Supreme Court of the United States, in referring to the famous case of *McPherson v. Buick Motor Co.,* stated as follows: "There must be knowledge of a danger, not merely possible, but probable."

McPherson v. Buick Motor Co., 217 N. Y. 383, 11 N. E. 1050.

Dalehite v. United States, 346 U. S. 15 at 42.

The record in this case is devoid of any evidence that North American had any knowledge that there was anything wrong with the airplane in question. The record is devoid of any evidence indicating knowledge, either *possible or probable,* that there was any defect in the plane. On the contrary, the evidence indicates that North American had inspected this plane in every facet of its development from the time its manufacture was started until it was delivered. Each part was progressively inspected, the components and all of the systems. [P. 333.] At least 225 inspectors were involved in these part-by-part inspections of the aircraft in question. There is no evidence to show that the defendant was negligent in connection with any of the inspections.

Appellees brought to the attention of this Court the suggestion that the plane *may* have been damaged by *some* type of fire in the electrical system. The testimony in this particular facet of the case was extremely vague. This Court with reference to that subject matter states as follows:

> "Foamite was found on part of the electrical system as the plane neared final assembly, indicating a fire. The parts affected by the fire were not replaced or inspected for damage after the fire. This is indicated by the presence of foamite, and that the only thing required by the inspector was to 'clean it off.'" (Opinion, p. 7.)

There is not one scintilla of evidence in the record which would indicate that there had actually been a fire within the electrical system itself which had in any manner *affected the electrical system or the airplane.* Foamite is merely a material which is used to fight fires. There is nothing in the evidence to indicate that the foamite itself would have any effect upon the airplane or upon the electrical system, and the uncontradicted evidence was that an inspector had directed that the foamite be cleaned off. The very fact that an inspector had made such a direction would indicate that nothing had happened to the electrical system. This entire bit of evidence raises nothing but conjecture and speculation which cannot afford the basis for any fair inference that the mere presence of the foamite or the use of the foamite had any possible causal connection with the ultimate crash of the plane or in any manner indicated that the manufacturer was guilty of any negligent act or omission. From this single entry respecting the foamite, the appellees would have this Court believe, and apparently this Court did believe, that the wiring was defective and that this in

turn might possibly have caused a spark to develop somewhere which might possibly have had some effect upon a possible leaking fuel line. Appellant can only suggest that the inferences which this Court draws are not fair or reasonable inferences and are based upon the rankest type of speculation. During the progress of the building of the plane, it is possible that paper or other material in proximity to the airframe may have ignited and caused some type of a minor fire on the floor of the plane, which was put out by the application of foamite. In the course of such a procedure it is possible that some of this preparation may have gotten upon the airframe itself. That this is the most probable explanation is indicated by the very fact that the inspector merely required that the foamite be cleaned off the airframe. The suggestion of appellees that "The parts affected by the fire were not replaced" is utterly unfounded in that it assumes that there was some part of the plane which was affected by the fire. The results of litigation of the type involved herein should not depend upon speculative evidence of this type.

The effect of the Court's decision is to impose an insurer's liability upon the appellant. The Court in effect has said that the *mere presence of an unidentified defect will establish liability upon the manufacturer.* This of course is contrary to the many cited cases. It must be kept in mind that the engine, for example, and other component parts of this plane, were purchased from other manufacturers, such as General Electric. The evidence was uncontradicted that appellant conducted such tests of the compo-

nent parts as were reasonable, and there was *no evidence to the contrary.* The law relating to the liability of a manufacturer who incorporates a component part, such as an engine, is well stated in *O'Rourke v. Day and Night Water Heater Co.,* 31 Cal. App. 2d 364, where at page 370 the Court affirmed a judgment notwithstanding the verdict, holding that as a matter of law the manufacturer was required to exercise only ordinary care in connection with its examination of the component parts involved in the finished product. The Court states at page 370:

> "The article in question, the safety pilot, came to the respondent as a sealed unit. Its very nature precluded an internal inspection and any such inspection would have necessarily destroyed the adjustment of its parts, which was essential to its operation. In such a case as this the rule relied upon by the appellants does not require the making of inspections and tests of this complicated and delicate device which destroying the usefulness of the article.
>
> "We conclude that the rules in question did not require the respondent to make internal inspections and tests of this complicated and delicate device which came to it finely adjusted and sealed, and that under such circumstances such external inspections and tests as were possible were all that was required of it in the exercise of ordinary and reasonable care. There being no evidence of negligence on the part of the respondent, it follows that the action of the court was correct."

III.

The Court Erroneously Stated That There Was "Substantial Evidence" to Support Appellees' Theory That the Crash Was Due to a Mechanical Defect Which Developed While the Plane Was Still in the Air, That Is, a Defect in the Manufacture of the Plane, Without Indicating What Evidence This Court Believed Supported Such a Theory.

Actually the court has not pointed out what substantial evidence is referred to. If by substantial evidence it is meant to incorporate the summary of appellees' argument contained on page 7 of the opinion, it is submitted that every part and parcel of this argument is predicated purely upon speculation.

It is impossible for petitioner to reconcile the statement of this court that "although the true cause of the accident will probably remain a mystery" with the court's statement that there was substantial evidence to support the proposition that there was a mechanical defect in the manufacture of the plane, for which the appellant was responsible. (Opinion, p. 8.)

It occurs to appellant that if the cause of the accident is a "mystery," it is just as "mysterious" to determine the mechanical defect, that appellant was responsible for, which caused the crash of the plane.

If the true cause of the accident was a mystery, how can it be said that the conduct of the pilot was non-contributory? How can it be said that the crash was not due to some mechanical defect for which appellant

North American could not be responsible, such as some *latent* and *hidden defect* contained within the jet motor itself, which was built by General Electric Company, and merely installed in the aircraft after being checked. [Tr. p. 790.] Obviously appellees failed to sustain the burden of proving negligence which proximately caused the crash of the plane.

Appellees have suggested that there was mechanical failure, caused by a flame out, and this Court has apparently adopted appellees' statement that there was substantial evidence to support appellees' theory. North American could *not* be responsible for a flame out which was caused by some latent or hidden defect within the motor which had been manufactured by General Electric and which was not even purchased by North American, but was owned and purchased by the Army and merely installed by North American. There is not one scintilla of evidence to even suggest that North American had been negligent in installing the jet motor in question. If there was a flame out and if that was the cause of the crash, and if there was a defect in the jet motor, this court has saddled North American with a liability without fault.

IV.

The Court Has Actually Applied Erroneously the Doctrine of Res Ipsa Loquitur to This Case in an Effort to Support the Judgment, Although the Doctrine Is Not Mentioned, an Its Application Cannot Be Justified Under the California Cases.

In the ordinary manufacturer's liability case, the burden, as has been heretofore pointed out, rests upon the plaintiff to establish that in some respect the manufacturer has been guilty of some negligent act or omission in connection with the manufacture of the product. This proof may be developed in a variety of methods. For example, it might be ascertained in a particular case that after an accident, a component part had been completely omitted from the machine. A plaintiff might present evidence, as in the case of *Northwest Air Lines v. Glenn L. Martin,* 224 F. 2d 120, that there had been a structural weakness in the design of the aircraft; that other planes of the same type and design had failed because of this same basic structural weakness, with expert testimony to establish this proposition. No such evidence appears in this case. There is not one scintilla of evidence that the plane was manufactured other than in strict accordance with the army specifications. There is no evidence that any part of the plane was defective or that the defendant had knowledge of the fact that any part of the plane was defective. Even assuming that it might be inferred from the evidence that there was some defective part of the plane, the evidence did not

point to any defect of which the appellant had knowledge, as opposed to any defect in some portion of the plane, such as the engine, for which the appellant could not possibly have been responsible, to wit, a latent defect occurring within some portion of the highly complicated and developed jet engine, manufactured by General Electric. Under the rule of the case of *O'Rourke v. Day and Night Water Heater Co.,* 31 Cal. App. 2d 364, North American cannot be held responsible for any flame out, or failure of the jet motor.

Probably the reason for the opinion which the Court wrote was that this Court was unable, just as respondent has been unable, to put its finger upon the cause of the accident. Accordingly, the Court in effect has bypassed the laws relating to manufacturer's liability and has imposed either an insurer's liability upon the appellant or has, without mention thereof, in effect applied the doctrine of *res ipsa loquitur.*

Under all of the recent California cases, the doctrine is obviously inapplicable. The burden was not upon the appellant to establish that the pilot did in fact cause the accident. In order for the doctrine of *res ipsa loquitur* to apply, the plaintiff must establish certain preliminary facts, to wit:

1. The accident must be of a kind which does not occur in the absence of someone's negligence;

2. The accident must be caused by an instrumentality within the exclusive control of the defendant;

3. The accident must not have been due to any voluntary action or contribution on the part of the pilot.

Ybarra v. Spangard, 25 Cal. 2d 486;

Lentz v. Coca-Cola, 39 Cal. 2d 436.

The latter requirement for the application of the doctrine of *res ipsa loquitur* places the burden upon the plaintiff of establishing *no fault or contribution on the part of the decedent.* Even in a case where the presumption of due care is available to the person claiming the benefit of the doctrine of *res ipsa loquitur,* if the evidence shows that the injury could have been caused by the voluntary act of the decedent, the doctrine cannot apply.

Spencer v. Beatty Safway Scaffold Co., 141 Cal. App. 2d 875;

La Porte v. Houston, 33 Cal. 2d 167.

More basic is the observation of the Supreme Court of California in the case of *La Porte v. Houston* (*supra*), where the court refused to apply *res ipsa loquitur* where there was no balance of probability in favor of negligence on the part of defendant, saying:

> "It was at least equally probable that the accident was caused by some fault in the mechanism of the car, for which defendants were not liable, as that it resulted from any negligent act or omission of the mechanic. Accordingly, it cannot be said that it is more likely than not that the accident was caused by the negligence of the defendants, and hence the case was not a proper one for the application of the doctrine of *res ipsa loquitur.*"

This Court has fallen into grievous error because even if it be assumed that there was a mechanical defect which developed while the machine was in the air, there is nothing to indicate that the defect did not arise by reason of some portion of the plane with reference to which North American was not a manufacturer. Under these circumstances it was at least equally probable that the accident would have been caused by some defect for which the defendant was not responsible. Even assuming that there was some defect in the fuel line, that fact alone does not establish negligence on the part of North American, if they had exercised ordinary care in manufacturing and inspecting the plane. It is common knowledge that in all types of machinery, flaws or defects occur which defy discovery by human ingenuity. It is impossible for this Court or anytbody else to say what defect there was, if any, in this particular plane—probably this Court has stated it about as well as anybody could state the matter when it says that the cause of the accident was a mystery. Being a mystery, it is not difficult to understand the inability of this Court to put the finger upon some particular act or omission on the part of the appellant as being the cause of the accident.

V.

The Court Has Failed to Cite Any Authority for Its Opinion and Has Refused to Pass Upon the Applicability of the Doctrine of Res Ipsa Loquitur Which Was Discussed by Both Parties to This Appeal.

Appellant has seldom seen a case where even though the chief contention of the parties related to the insufficiency of the evidence to justify the judgment, an opinion could be written of tremendous importance to the entire aviation industry, without the citation of a single authority. The difficulty of attacking this case on appeal has been tremendous and it is just as difficult on this petition for rehearing, for the simple reason that petitioner here, as in its original presentation and in the trial court, has been unable to determine the actual cause of the crash and has been unable to determine from the record any evidence of negligent conduct on its part. The Court has refused to even consider the many cases cited by both counsel on the doctrine of *res ipsa loquitur,* and yet in effect has applied the doctrine. A rehearing should be granted for the purpose of clearing up this opinion and stating the evidence which indicates some negligent act or omission on the part of appellant and petitioner. The case, more than any case that counsel have ever observed, consists of a maze of speculation. It is no different than the man who attempts to add a column of 24 zeros. When he draws his line at the base of the column of zeros and adds them up, the result is still zero. When all of the so-called evidence in favor of the appellees is piled up, there is not one single piece of this evidence, individually or added up, which establishes on a substantial basis or otherwise, that the appellant was

guilty of any negligent action in connection with the manufacture of the aircraft. There is not even any evidence that in fact there was any defect, whether appellant was responsible for the defect or not. It is suggested that the fuel line may possibly have ruptured. It is suggested that there may have been some trouble in the electrical system. It is suggested that the pilot may have attempted to switch to the emergency system. It is suggested that there may have been a spark caused by some defective wiring, although no such defect is established, inferentially or otherwise. It is suggested that the pilot may have lost control because of an explosion in the cockpit. It is suggested that the electrical-hydraulic system may have failed. It is suggested that a fire may have been the proximate cause of the accident.

Each and every one of these suggestions is nothing more than pure speculation. If it were otherwise, this Court would not have made the statement that the cause of the accident was a mysery. There would have been no necessity for such a statement and the Court in all good conscience could have said that there was substantial evidence to support the conclusion that there was a mechanical defect which existed in some particular portion of the plane, which caused the crash.

Conclusion.

It is respectfully submitted that this Honorable Court has fallen into grievous error in connection with its opinion in this case. That the basic flaw in the opinion relates to the statement of the Court that the appellant was responsible for a mechanical defect which developed while the machine was in the air. This is not the law and cannot be the law.

Applicant is responsible under its manufacturer's liability obligation where it has been shown by a preponderance of the evidence that the appellant was negligent in connection with the manufacture of the plane and that this negligence was the proximate cause of the accident. The evidence falls far short of any such a showing. Even if it be assumed that there was some type of a defect in the plane, the exact character unknown, the defect may just as well have been in the motor, for which defect appellant under well settled rules would not have been responsible. The possibility or probability that any defect may have been a latent defect in the motor, the possibility or probability that the cause of the crash may have been due to some voluntary act on the part of the pilot renders the verdict nugatory, because no one can say that the cause of the crash was anything other than a mystery, and under these circumstances the appellant should not bear the burden of this loss, where the evidence is in such a state that it is just as probable that the crash was caused by negligence on the part of General Electric or negligence on the part of the deceased pilot as it was due to any negligent act or omission on the part of North American.

It is respectfully submitted that this Court should grant this petition for rehearing.

Respectfully submitted,

CRIDER, TILSON & RUPPE, and
HENRY E. KAPPLER,

Attorneys for Appellant.

Certificate of Counsel.

I, Henry E. Kappler, one of counsel for the appellant, in the above entitled cause, hereby certify that in my judgment, and in the judgment of all other counsel for appellant, the petition for rehearing is well founded and that it is not interposed for purposes of delay.

HENRY E. KAPPLER